September 27, 2000

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION ON APPEAL OF SUPPLEMENTAL NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E9900061F**

MAILBOXES, ETC./PERRY PORDEL
Code Enforcement Appeal

Location: 4560 (aka 4580) Klahanie Drive Southeast

Appellant: Mailboxes, Etc. *represented by*
4580 Klahanie Drive SE
Issaquah, WA 98029

Perry Pordel
3935 – 202nd Place SE
Issaquah, Wa 98029

King County: Department of Development and Environmental Services
Building Services Division, Code Enforcement Section
represented by **Jeri Breazeal**
900 Oakesdale Avenue Southeast, Renton, WA 98055-1219
Telephone: (206) 296-7264 Facsimile: (206) 296-6604

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Deny the appeal
Department's Final Recommendation:	Deny the appeal
Examiner's Decision:	Grant the appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	August 31, 2000
Hearing Closed:	August 31, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Commercial signs—height limits
- Hearing Examiner jurisdiction
- Substantive due process

SUMMARY:

The code enforcement appeal is granted.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On July 25, 2000 the King County Department of Development and Environmental Services issued a supplemental notice and order to Mailboxes, Etc., Claremont Development Co. and Hogate/Klahanie LLC citing the construction of a building- mounted façade sign that exceeds ten feet in height above both finished grade and the façade wall. The supplemental notice and order alleges that the sign height does not meet the requirements of Permit B98A2204 and violates Klahanie Commercial Center rezone Condition No. 28 adopted by the King County Council under authority Ordinance No. 10996. The supplemental notice and order supersedes a notice and order issued on February 16, 2000 that contained no reference to the building permit.

2. Mailboxes, Inc. has appealed the supplemental notice and order. The owner of the Mailboxes franchise, Perry Pordel, asserts in his appeal statement that the top of the sign in issue only exceeds ten feet by three and one half inches, that this difference is not noticeable, and that it would cost him approximately $1,000 to readjust the sign due to the nature of its beam structure.

3. It is uncontested that the Mailboxes front façade sign attains a height of approximately 10 feet, 3 inches. Condition No. 28 of the 1993 rezone decision requires that "no building-mounted sign on-site shall extend above 10 feet finished grade or the building façade (wall), whichever is less." A diagram attached to the building permit for the Mailboxes sign contains a similar notation: "10'0" MAXIMUM clearance from top of sign to grade".

4. In the absence of the rezone condition, the King County Zoning Code would permit a commercial sign in this location to exceed a 10-foot maximum height. KCC 21A.20.060.G provides in the Commercial Business zone that wall signs should not extend "above the highest exterior wall upon which the sign is located". As shown by the photograph in Exhibit No. 9, the front wall adjacent to the Mailboxes sign is covered by a roof gable; the Mailboxes sign as it currently exists could be elevated another 4 or 5 feet without violating the code requirement.

5. As disclosed by the 1993 rezone decision, the purpose for the 10-foot height limitation is to

mitigate the impacts of placement of an urban shopping center on the Urban Growth boundary adjacent to Rural-zoned properties to the south. This rationale is explained as follows within Finding No. 14 of the rezone decision:

> "The visibility of on-site signs and lighting to rural residential properties to the south was also a topic of considerable debate throughout the public hearing….The major remaining dispute concerns the appropriate height to be accorded to building-mounted signs. The staff report originally proposed a 25-foot height limit above finished grade for building- mounted signs, while the Andersons argued for an 8-foot height limit based on restrictions imposed on a similar shopping center development within a residential neighborhood on Mercer Island. The Applicant has supported the more liberal signage height limit, with both the Applicant and the staff finally agreeing to a 15-foot recommendation.
>
> "Given the elevation differences between the site and the abutting roadways and considering the higher elevations of the residential properties to the south, on-site signage is more likely to be visible to the neighboring residents than it is to passing traffic. Notice to passing traffic of the commercial center will be communicated largely through the identification signs and tenant directories located along Klahanie Drive. Building- mounted signs will be useful primarily to those individuals who have already entered the commercial center parking lot. If off-site rural properties are truly to be insulated from commercial impacts, signage heights need to be severely restricted. This report recommends imposing a 10-foot height limit for building-mounted signs consistent with the conditions proposed by the Council review panel."

6. It is uncontested that no final inspection occurred with respect to the sign permit (B98A2204). The sign was constructed by a commercial contractor in Gig Harbor, and when a County inspection was attempted, it could not be completed because a copy of the permit and plans were not available on-site at the Mailboxes facility.

7. It is also uncontested that the Mailboxes façade sign is not visible from Rural-zoned properties lying to the south. Views of the shopping center generally are screened on the south side by an earthen berm upon which have been planted evergreen trees.

8. The only off-site location from which the Mailboxes sign might be visible is from the residential condominiums located west of Klahanie Drive. It is possible that the Mailboxes sign could be viewed from some of these units across the shopping center parking lot and through its southernmost access driveway at a distance of approximately 500 feet. There is no evidence indicating that the impacts of this distant view of the Mailboxes sign would be decreased if the sign were lowered another 3 inches.

9. At the public hearing, Mr. Pordel expanded upon the contention contained in his appeal statement that it would cost him approximately $1,000 to re-set the sign 3 inches lower. It was his testimony that each of the 3 words in the Mailboxes sign were independently mounted on the building so that 3 separate adjustments would be required. Based on conversations with other merchants at the shopping center who have recently been required to relocate their signs, Mr. Pordel's estimate was that the cost of such a procedure would range between $1,200 and $1,500.

Alternatively, failure to comply with the terms of the notice and order also has a significant financial cost attached to it. The supplemental notice and order imposes an initial civil penalty of $500 for failure to comply with its terms by August 24, 2000, with additional penalties of $750 and $1,000 imposed if further delay occurs.

CONCLUSIONS:

1. We are troubled by both the wisdom and legality of a County procedure that imposes either significant costs or penalties on a business owner for failure to rectify a minor deviation from construction standards where no public or private benefit will be derived from the compliance process. While there is perhaps no legal doctrine that perfectly fits the factual circumstances presented in this record, there are important principles that appear to apply to the situation and are implicitly recognized by the Title 23 code enforcement scheme.

2. First, there is the recently revived Constitutional doctrine of substantive due process that subjects the operation of regulations to review for reasonableness. The Washington Supreme Court has set out a three-pronged test for determining whether a substantive due process violation has occurred: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Presbytery of Seattle vs. King County* 114 Wa.2nd 320 at 330 (1990).

3. Assuming that a tenancy interest is sufficient to support a substantive due process challenge, that controlling commercial impacts on nearby residential properties is a legitimate public purpose and that a height limitation on signs is a reasonably necessary instrument to achieve that public purpose, the essential question comes down to whether the regulatory imposition is, under the specific circumstances, unduly oppressive.

   Quoting *Presbytery*, the Washington Supreme Court in *Guimont vs. Clarke* 121 Wa.2nd 586 at 610 (1993) proposed the following approach:

   > "We determine if the statute is unduly oppressive by examining a number of non-exclusive factors to weigh the fairness of the burden being placed on the property owner:
   >
   > On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible for the owner to alter present or currently planned uses."

4. In the instant case, the burden on the Appellant is simply that of paying to have a sign relocated downward a few inches. This fairly minor burden is easily justified if any legitimate public benefit can be identified with it. The problem in the Mailboxes instance, however, is that no public benefit at all can be derived from requiring the business to relocate its sign downward 3 inches. The sign is not visible from the Rural properties that the height regulation is designed to protect, and from the distant urban condominiums lying to the west, the 3 inch change of height would be imperceptible. Beyond questions of off-site visibility, the only other public interest that comes into play is the need to maintain within the Klahanie Commercial Center a regular and consistent sign height appearance and policy. While this may be a legitimate concern, we are again led to the conclusion that a 3 inch deviation results in an imperceptible degree of variability so long as the top of the sign remains below the top frontage crossbeam (see Exhibit No. 9). It is, therefore, also insufficient to invoke the public interest.

5. Another possible legal approach to this factual situation is to consider that a minor deviation from the height standard constitutes substantial compliance with the regulatory standard. Since the underlying rationale for a finding of substantial compliance is that the policy and purpose of the regulation have been met, see, e.g., *Andrews vs. Olin*, 2 Wa.App. 744 (1970) and *Dunkelberger vs. Baker*, 12 Wa.App 917 (1975), the application of this doctrine to the facts at hand would seem to be appropriate. On the other hand, the substantial compliance doctrine has traditionally been limited to jurisdictional and procedural questions and is not generally extended to the regulation of structures or physical activities.

6. A further matter is, of course, whether the Hearing Examiner has jurisdiction to entertain the kinds of Constitutional and equitable defenses that the foregoing doctrines imply. Since quasi-judicial officers only possess those powers that have been assigned to them by statute or ordinance, the general view is that the application of Constitutional and equitable doctrines is beyond the realm of Examiner administrative authority.

   Certainly, this restricted view of Hearing Examiner jurisdiction must prevail when it comes to dealing with facial challenges to the validity of an ordinance or regulation, but where the application of an ordinance or regulation is unclear and the legislative enactment requires interpretation, our view has consistently been that the Hearing Examiner is empowered (and probably required) to provide interpretations of relevant ordinances and regulations in a manner that avoids violating Constitutional principles.

7. Moreover, the recently enacted provisions of KCC Title 23 confer authority to recognize relevant Constitutional principles and equitable doctrines in the review of alleged code enforcement violations. In the Title's purpose section, KCC 23.01.010.B first relates the County's intention to pursue code compliance in order to protect the health, safety and welfare of the general public, but then states that "this County intention is to be pursued in a way that is consistent with adherence to, and respectful of, fundamental constitutional principles." On a similar note, KCC 23.02.040.H confers upon County administrators the authority to waive code requirements "so as to avoid substantial injustice."

   Moreover, the need for a flexible regulatory response based on considerations of justice has also been related specifically within Title 23 to the concept of substantial compliance. For example, under certain non-culpable circumstances, a property owner, even though in violation of a code

requirement, is to be held responsible "only for bringing the property into compliance to the extent reasonably feasible under the circumstances" (KCC 23.02.130.B). Similar latitude is conferred upon the Hearing Examiner within the administrative appeal framework where "strict

compliance with permit requirements may be waived regarding the performance of…an abatement in order to avoid doing a substantial injustice to a non-culpable property owner."

8. In view of the foregoing, it is our conclusion that Title 23 confers upon the Hearing Examiner within the code enforcement appeal process authority sufficient to make decisions that avoid violation of Constitutional principles in the application of regulations to specific properties and to recognize equitable factors as affecting the degree of code compliance necessary when the requirements of justice so dictate.

9. Applying the foregoing principles to the Mailboxes factual situation, requiring the Appellant to spend approximately $1,000 to adjust slightly the height of his façade sign is legally defensible only if there has been a showing that a public purpose will be served thereby. This means either that the sign is visible from some off-site residential property and the difference in sign height embodied by the violation has some increased effect on off-site visual impacts, or that the amount of deviation of the sign from the height standard adversely affects the uniform appearance projected by Klahanie Commercial Center frontage signs generally. In the instant case, there is a minute visual impact overall, no increase in impact attributable to the height deviation, and no discernible effect on the uniform presentation of commercial signs in the shopping center. Accordingly, strict enforcement of the rezone height requirement under the specific facts of this case is unduly oppressive, and the appeal will be granted.

DECISION:

The appeal is GRANTED.

ORDERED this 27th day of September, 2000.

_____
Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 27th day of September, 2000, by first-class, certified mail to the following party:

Perry Pordel
Mailboxes, Etc.
4580 Klahanie Drive SE
Issaquah, WA 98029

TRANSMITTED this 26th day of September, 2000, to the following parties and interested persons:

Parks Anderson
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Issaquah WA 98027

Phil Davidson
Claremont Development Company
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Alan Ferin
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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE AUGUST 31, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E9900061F – MAILBOXES, ETC:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the Department was Jeri Breazeal. Participating in the hearing and representing the Appellant was Perry Pordel. There were no other participants in this hearing.

The following exhibits were offered and entered into the record:

Exhibit No. 1 DDES staff report to the Hearing Examiner, dated August 31, 2000
Exhibit No. 2 Notice & Order, issued February 16, 2000
Exhibit No. 3 Statement of Appeal, received March 10, 2000
Exhibit No. 4 Supplemental Notice & Order, issued July 25, 2000
Exhibit No. 5 Amended appeal, received August 10, 2000
Exhibit No. 6 Letter to Mailboxes, Etc., dated November 8, 1999
Exhibit No. 7 Sign permit and approved plans
Exhibit No. 8 Pre-hearing order, dated July 21, 2000
Exhibit No. 9 Pictures
Exhibit No. 10 Rezone conditions

SLS:sje
Code enf/E9900061F RPT